In the Court of Appeals of the State of Alaska

David Christopher Nordlund, Appellant, v. **State of Alaska,** Appellee.	Court of Appeals No. **A-13607** **Order** Date of Order: **April 18, 2023**

Trial Court Case No. **3AN-19-04232CR**

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

The appellant in this appeal, David Nordlund, is represented by Nathan Charles, who was appointed to represent Mr. Nordlund under Alaska Administrative Rule 12(e).

Shortly after filing the opening brief in this case (but before the brief had been accepted for filing under Alaska Appellate Rule 212), Mr. Charles moved to withdraw from Mr. Nordlund's case without Mr. Nordlund's consent.[1] In his motion, Mr. Charles argued that he presented good cause to grant his request to withdraw based on his "animus towards the State of Alaska as a sovereign." As evidence of this animus, Mr. Charles referred to a federal civil rights lawsuit that he had filed against the State challenging their decision to fire him as an assistant district attorney because he relocated to Maryland from Alaska during the pandemic with his state-issued laptop in violation of a direct order from his supervisor. According to Mr. Charles, the federal lawsuit "has become contentious because the State of Alaska has maintained an untenable, bad-faith position in the case."

[1] *See* Alaska R. App. P. 517.1(f)(1)(A).

The State of Alaska, represented in Nordlund's appeal by Assistant Attorney General Kenneth Rosenstein, opposed the motion to withdraw, arguing that Mr. Charles had not shown good cause to withdraw. In his opposition, Mr. Rosenstein pointed out that Mr. Charles had already filed his federal lawsuit at the time he accepted his Rule 12(e) appointment.[2] The commentary to Alaska Professional Rule 1.16 states, in pertinent part,

> A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.[3]

Mr. Rosenstein therefore questioned how Mr. Charles's animus to the State constituted good cause to withdraw when that animus apparently pre-existed Mr. Charles's appointment to Mr. Nordlund's case and Mr. Nordlund's own interests were adverse to the State. Mr. Rosenstein also argued that allowing Mr. Charles to withdraw prior to the filing of the reply brief would result in additional delay that could prejudice Mr. Nordlund's interests.

This Court subsequently issued an order at the direction of Chief Judge Allard denying Mr. Charles's motion to withdraw. The denial was without prejudice to Mr. Charles renewing the motion once briefing was complete.

After the opening brief was accepted for filing, the State, through Mr. Rosenstein, moved for a 180-day extension under Standing Order No. 12 in which to file its appellee brief.

---

[2] Mr. Rosenstein also attached an order from a federal magistrate judge recommending that the State's motion to dismiss Mr. Charles's federal action be granted because Mr. Charles's complaint failed to state a viable claim.

[3] Alaska R. Prof. Conduct 1.16, cmt. para. 1.

(Standing Order No. 12, which is posted on the court system's website and publicly available, is an interim measure that seeks to address the current resource problems in the state agencies involved in criminal appeals (the Alaska Public Defender Agency, the Office of Public Advocacy, and the State Office of Criminal Appeals) by allowing those agencies to obtain extensions outside the normal appellate rules. Over time, the extension limits permitted by Standing Order No. 12 have decreased with the stated goal of eliminating the agencies' briefing backlog as well as the need for Standing Order No. 12. We note that the Public Defender Agency, who was initially appointed to represent Mr. Nordlund, requested the full extension time (390 days) currently permitted for opening briefs by Standing Order No. 12 prior to moving to withdraw from the case based on a positional conflict. After accepting the Rule 12(e) appointment, Mr. Charles also moved for a 60-day extension outside the limits of Standing Order No. 12, which the State did not oppose, and which this Court granted.)

Mr. Charles opposed the State's request for a 180-day extension. In his opposition, Mr. Charles referred to the State's arguments about delay in the State's prior opposition to Mr. Charles's motion to withdraw as "histrionic" and Mr. Charles stated that "the assigned Assistant Attorney General" had shown "his true stripes" when he then requested a lengthy extension on behalf of the State.

The State, through Mr. Rosenstein, filed a reply to the opposition to the State's extension request. In the reply, Mr. Rosenstein explained the history of Standing Order No. 12 and the reasons why the State required the extension. The reply also "[took] issue with the unfounded, unnecessary personal attack" and "unfounded innuendo" in Mr. Charles's opposition, disputing that the State's prior arguments had been "histrionic."

This Court granted the State's extension request over Mr. Charles's objection. The State later requested and received an additional twenty-day extension under Standing Order No. 12, and subsequently filed its appellee brief.

Mr. Charles then timely filed Mr. Nordlund's reply brief, accompanied by a new motion to withdraw. The State opposed the motion to withdraw, arguing that Mr. Charles should be required to remain in the case until this Court issued its decision so that Mr. Charles could advise Mr. Nordlund, if necessary, whether to file a petition for hearing with the Alaska Supreme Court.

This Court did not rule on Mr. Charles's second motion to withdraw because other matters — namely, the State's motion to strike the reply brief — took precedence. The State (through Mr. Rosenstein) moved to strike the reply brief Mr. Charles filed on two grounds.

First, the State pointed out that the brief contained inadmissible hearsay that was outside the record on appeal. Alaska Appellate Rule 210(a) states, in pertinent part, that "[t]he record on appeal consists of the entire trial court file, including the original papers and exhibits filed in the trial court, the electronic record of proceedings before the trial court, and transcripts, if any, of the trial court proceedings." Although procedural mechanisms exist to supplement the record with materials filed in the trial court after the notice of appeal is filed and/or to litigate any disagreement about what occurred in the trial court, the rule is clear that "[m]aterial never presented to the trial court may not be added to the record on appeal."[4]

Notwithstanding this rule, the reply brief in this case includes factual information that is not part of the record on appeal and that was never presented to the

[4] Alaska R. App. P. 210(a); *see also* Alaska R. App. P. 210(i) (requiring any supplementation of the record to be accomplished by motion).

trial court. Specifically, the reply brief states that "the undersigned [*i.e.*, Mr. Charles] spoke directly to Appellant's trial counsel by Zoom on May 19, 2022, at 1:21 PM EDT" and that trial counsel had "confirmed" that he had not received the police reports from April 17, 2019, that the trial court had ordered the State to produce as discovery. (In the opening brief, Mr. Charles argued that the State's failure to produce these records violated Alaska Criminal Rule 16 and *Brady v. Maryland*, 373 U.S. 83 (1963). In its appellee brief, the State read the record as suggesting that the records *had* been produced.)

As the State pointed out, it was improper for Mr. Charles to include information about his recent Zoom call with Mr. Nordlund's trial counsel when the call was not part of the record on appeal and had never been presented to the trial court. As a lawyer licensed in Alaska and practicing before the Alaska appellate courts, Mr. Charles has a duty to familiarize himself with Alaska law and appellate rules and to follow those rules in his filings before this Court.[5]

The second reason why the State (through Mr. Rosenstein) moved to strike the reply brief was based on the multiple *ad hominem* attacks that Mr. Charles made against Mr. Rosenstein personally in the brief. The reply brief refers to Mr. Rosenstein by name and includes language accusing Mr. Rosenstein of malfeasance and arrogance. The reply brief includes statements such as the following:

> Assistant Attorney General Kenneth Rosenstein — with all of his profound and notorious arrogance — misread the record in such a way as to convince himself that the State actually had completed its discovery violations.
>
> . . . .

[5] *See* Alaska R. Prof. Cond. 1.1(a) (duty of competence).

> Mr. Rosenstein's argument regarding the supposed inadequacy of Appellant's briefing on the *Brady* issues is nothing more than a pompous screed predicated on Mr. Rosenstein's own grossly negligent review of the record.
>
> . . . .
>
> Whether in a deliberate attempt to deceive this court, or merely due to the gross negligence brought about by Kenneth Rosenstein's profound arrogance, the State has misrepresented to this Court that it fulfilled its discovery obligations.

The State's motion to strike argued that these statements constituted *ad hominem* attacks that "are prohibited by the ethical rules," citing Alaska Rule of Professional Conduct 4.4(a).

(Rule 4.4(a) states, in pertinent part, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person."[6] We note that the preamble to the Alaska Rules of Professional Conduct also states, *inter alia*, that a "lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers[,] and public officials," and it directs lawyers to "zealously [] protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.")

---

[6] *See In re Shea*, 273 P.3d 612, 621 (Alaska 2012) (upholding Alaska Bar Association's determination that attorney violated Rule 4.4(a) by filing unprofessional pleadings that were "replete with demeaning, offensive, insulting, intemperate, frivolous and outrageous conduct and statements"); *see also In re Comfort*, 159 P.3d 1011, 1020 (Kan. 2007) (holding that attorney violated Rule 4.4 because "an objective evaluation of the conduct would lead a reasonable person to conclude" that the purpose was to embarrass, delay, or burden a third party, namely opposing counsel).

The State's motion to strike also alleged that (1) Mr. Charles threatened Mr. Rosenstein after the State filed an opposition to Mr. Charles's original motion to withdraw, saying "you're going to regret this"; (2) Mr. Charles threatened to sue Mr. Rosenstein personally after the State filed its second motion for extension of time under Standing Order No. 12; and (3) Mr. Charles threatened to report Mr. Rosenstein to the Alaska Bar Association if he did not correct the appellee brief.

Mr. Charles filed an opposition to the State's motion to strike his reply brief. In the opposition, Mr. Charles stated that he "stands by every word . . . especially those portions questioning the competence and character" of Mr. Rosenstein. He further stated that he "full[y] intends" to sue Mr. Rosenstein and file a bar complaint. He also criticized this Court for granting the State's extension request, arguing that this action extended the amount of time he had to remain an Alaska Bar member against his wishes, constituting "an intentional deprivation of [his] rights under the Free Association Clause." Mr. Charles further claimed that Mr. Rosenstein lied to this Court and that "Rosenstein's performance has been atrocious."

This Court (through an order entered at the direction of Chief Judge Allard) subsequently granted the State's motion to strike the reply brief. The order required Mr. Charles to "resubmit a reply brief that does not rely on information outside the record on appeal and that does not engage in *ad hominem* attacks against the State's appellate counsel that are inconsistent with the rules of professional responsibility." The order further noted that "[t]o the extent that Mr. Charles believes that there has been State malfeasance or bad faith, this point can be made without resorting to the inflammatory and unprofessional language currently contained in the reply brief."

Mr. Charles filed a motion for full-court reconsideration, accusing the Court of incompetence and stating that he was "dumbfounded and nonplussed" that the

Court would not allow him to include unsworn hearsay about the contents of a Zoom call that had never been presented to the trial court and was not part of the record on appeal. According to Mr. Charles, because "the proper resolution of a *Brady* claim **always** includes extrinsic evidence," such extrinsic evidence must necessarily be allowed on direct appeal even if it is not part of the record and was never presented to the trial court.

Mr. Charles's motion for reconsideration did not demonstrate any understanding that Alaska Appellate Rule 210(a) limits the record on appeal to material that was presented to the trial court. To the contrary, Mr. Charles criticized Mr. Rosenstein for relying on the rule, which he claimed was "inapposite." Mr. Charles also did not demonstrate any awareness of Alaska Criminal Rule 35.1, the rule governing post-conviction relief applications, which are filed in the trial court and *can* rely on extrinsic evidence outside the original trial record.[7] Indeed, Mr. Charles seemed not to understand the procedural differences between direct appeals and post-conviction relief actions: he cited to a Ninth Circuit case (*Williams v. State*, 623 F.3d 1258 (9th Cir. 2010)) as support for his claim that extrinsic evidence should be permitted on direct

[7] We note that, to the extent that Mr. Nordlund's claims rely on information outside the record or require him to challenge his attorney's actions as ineffective, such claims are most appropriately raised in an application for post-conviction relief filed under Alaska Criminal Rule 35.1. *See* AS 18.85.100(b) & (c); *Barry v. State*, 675 P.2d 1292, 1295-96 (Alaska App. 1984) (explaining that most ineffective assistance of counsel claims cannot be raised on direct appeal and instead must be raised through a post-conviction relief application because such claims generally rely on information outside the record). We also note that, unlike many jurisdictions, Alaska grants indigent defendants litigating a first application for post-conviction relief the right to counsel. *See Grinols v. State*, 10 P.3d 600, 604 (Alaska App. 2000), *aff'd in relevant part*, 74 P.3d 889 (Alaska 2003).

appeal even though that case was an appeal from a federal habeas action, itself following a state post-conviction relief proceeding.

In addition to his motion for full-court reconsideration, Mr. Charles also filed a motion to strike the State's appellee brief. In the motion to strike, Mr. Charles argued that Mr. Rosenstein violated either Alaska Rule of Professional Conduct 1.3 (requiring a lawyer to act with diligence and promptness) or Alaska Rule of Professional Conduct 3.3 (prohibiting false statements of fact or law to a tribunal) when he claimed in his brief that the requested discovery had been produced. Mr. Charles further asserted that any claim that the reply brief violated the professional rules was "dubious at best."

The State (through Mr. Rosenstein) filed an opposition to the motion to strike the appellee brief, arguing that there was no basis to strike the appellee brief. The State also noted that this Court would be in a position, after reviewing the trial record and the briefing, to determine whether the State had misrepresented the record and that "Nordlund's appellate lawyer's attempt to resolve his claim of alleged misstatements via a motion to strike threatens only to further delay the ultimate resolution of, and to divert the court from, the real issues in this case."

Mr. Charles subsequently filed "Appellant's notice regarding the Court's March 3 [sic], 2023 order" (the order issued at the direction of Chief Judge Allard granting the State's motion to strike the reply brief). In the notice, Mr. Charles explained that he had filed a new reply brief but that he had not followed the Court's order and had not "soften[ed] the language" or deleted the reference to his Zoom call with the trial attorney. Mr. Charles referred to the Court's order as "deeply flawed" and he argued that the Court's order was "almost certainly yet another violation of Appellant's due process, to say nothing of a prior restraint under the Free Speech Clause of the First Amendment." Mr. Charles further asserted that he had conducted "research" and he

claimed that this research "overwhelmingly indicates that some volume of extrinsic evidence is both appropriate and necessary to the proper resolution of a *Brady* claim on appeal." Mr. Charles did not cite to any actual case law or court rules to support this claim, and he again failed to distinguish between the procedures that govern a direct appeal to this Court as opposed to the procedures that govern an application for post-conviction relief filed in superior court.

Two days later, Mr. Charles filed a "notice rescinding motion to withdraw," in which he withdrew his second motion to withdraw (which had not yet been ruled on by this Court). In the notice, Mr. Charles asserted that he was being "set up" by the Alaska Bar Association to be disbarred, and that he had been forced to pay the "first installment of Alaska's exorbitant bar dues." Mr. Charles then asserted that he would remain a member of the Alaska Bar Association and assigned to this case for the next year and that he "will use the next 12 months to serve one purpose — and one purpose only: to represent the interests of David Nordlund, and hold the several incompetent, venial, and corrupt attorneys, judges, and other public officials appropriately accountable for the farce that has been his prosecution and this appeal."

On the same day that Mr. Charles filed his notice to rescind his motion to withdraw, the State (through Mr. Rosenstein) filed a response to Mr. Charles's filing of the second reply brief. The State argued that this Court should reject the new reply brief because it contained the same objectionable material as the first reply brief. Mr. Rosenstein also noted that he was concerned about the *ad hominem* attacks on his reputation given that the briefs will be publicly available on Westlaw.

***

Currently pending before this Court is Nordlund's motion to strike the appellee's brief and Nordlund's motion for full-court reconsideration of Chief Judge Allard's order granting the State's motion to strike the reply brief. (The Court views this latter motion as still ripe even though Mr. Charles has filed a second reply brief because the second reply brief is not materially different from the first reply brief.)

The Court's primary concern at this point is the continuing delay that the proceedings detailed above have caused. The Court notes that, although Mr. Charles has now rescinded his motion to withdraw, he had previously indicated that the motions to withdraw were filed without Mr. Nordlund's consent. The Court assumes that Mr. Charles has been in contact with Mr. Nordlund, and further assumes that Mr. Charles would have alerted the Court if Mr. Nordlund wanted Mr. Charles removed and a different attorney appointed to represent him in this appeal. Accordingly, based on the record currently before us, we assume that Mr. Nordlund is not dissatisfied with Mr. Charles's representation or the briefs that have been filed on his behalf, and that Mr. Nordlund's primary interest is in having this appeal decided as soon as possible.[8]

Having reviewed all of the filings described above, this Court has serious concerns about Mr. Charles's professionalism. As already noted, the preamble to the Alaska Rules of Professional Conduct states that a "lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers[,] and public officials." It also directs lawyers to "zealously [] protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional,

[8] We note that Mr. Nordlund retains the right to raise a claim for ineffective assistance of appellate counsel through the post-conviction relief process. *See* Alaska R. Crim. P. 35.1; *see also Coffman v. State*, 172 P.3d 804, 806-07 (addressing ineffective assistance of appellate attorney claim).

courteous, and civil attitude toward all persons involved in the legal system." Mr. Charles's conduct violates these principles. Alaska Rule of Professional Conduct 8.2(a) also prohibits a lawyer from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge." In multiple filings, Mr. Charles has impugned the integrity of this Court. These attacks are based, in large part, on Mr. Charles's seemingly willful refusal to understand basic principles of Alaska appellate procedure and Alaska law. Under Appellate Rule 210(a), it was improper for Mr. Charles to include factual information in his reply brief that was not part of the record on appeal and that had never been presented to the trial court. The March 2, 2023 order striking the reply brief on this ground was correct.

It was also improper for Mr. Charles to include *ad hominem* attacks against his opposing counsel. Alaska Rule of Professional Conduct 4.4(a) prohibits a lawyer from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person." Mr. Charles argues that "a third person" does not include opposing counsel. But there is case law from this jurisdiction and other jurisdictions directly refuting that contention.[9] Mr. Charles also argues that the personal attacks were related to substantive claims about State malfeasance, and therefore had a

[9] *See, e.g.*, *In re Shea*, 273 P.3d at 618, 621 (upholding Alaska Bar Association's determination that an attorney violated Rule 4.4(a) through "demeaning, offensive, insulting, intemperate, frivolous and outrageous conduct and statements" whose purpose "was to embarrass, demean, offend, intimidate, and harm the reputations of [the other party] *and his counsel*") (emphasis added); *In re Comfort*, 159 P.3d at 1020, 1025 (holding that opposing counsel and court personnel qualify as "third persons" for purposes of Rule 4.4 and concluding that attorney violated Rule 4.4 because "an objective evaluation of the conduct would lead a reasonable person to conclude" that the purpose was to embarrass, delay, or burden opposing counsel).

purpose beyond simply embarrassing or burdening Mr. Rosenstein. But courts in other jurisdictions have held that while a lawyer's subjective intent is relevant to the question of whether the lawyer violated Rule 4.4, it is ultimately an objective test.[10] Here, Mr. Charles could have easily (and more effectively) raised substantive concerns about the State's actions in this case without resorting to such highly personalized and gratuitous attacks that mainly distract from the force of the legal arguments being made. Moreover, contrary to Mr. Charles's claims, a court order requiring an attorney to refrain from unprofessional, intemperate, and inflammatory language does not infringe on an attorney's right to free speech.[11]

Although we agree that the March 2, 2023 order was justified and in accordance with the applicable law, we nevertheless conclude that there is relatively

---

[10] *See, e.g.*, *In re Comfort*, 159 P.3d at 1020 ("A lawyer cannot escape responsibility for a violation based on his or her naked assertion that, in fact, the 'substantial purpose' of conduct was not to 'embarrass, delay, or burden' when an objective evaluation of the conduct would lead a reasonable person to conclude otherwise.").

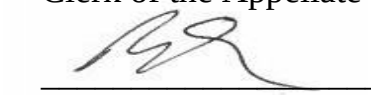
[11] *See id.* at 1025-27 (recognizing that lawyers "trade certain aspects of their free speech rights for their licenses to practice" and that "[a] lawyer's right to free speech is tempered by his or her obligation to both the courts and the bar"); *State ex rel. Nebraska State Bar Ass'n. v. Michaelis*, 316 N.W.2d 46, 53 (Neb. 1982) ("A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. . . . 'A layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canons of Ethics; and if he wishes to remain a member of the bar he will conduct himself in accordance therewith.'") (quoting *In re Woodward*, 300 S.W.2d 385, 393-94 (Mo. 1957)); *In re Garaas*, 652 N.W.2d 918, 926 (N.D. 2002) ("A lawyer's right to exercise free speech does not permit a lawyer appearing in a judicial proceeding in open court to call opposing counsel a liar, to threaten a judge with personal liability if he rules a certain way, to accuse an appellate court of false misrepresentation, or to engage in a lengthy, disruptive, belligerent, and disrespectful exchange with the court.").

little to be gained from requiring Mr. Charles to submit a third reply brief given Mr. Charles's apparent willingness to persist in unprofessional behavior and to escalate that behavior when challenged. We likewise conclude that addressing Mr. Charles's lack of professionalism through an order to show cause why sanctions should not be imposed will only result in further escalation and unwarranted delay in resolving this appeal. This is not to say that Mr. Charles should face no consequences for his unprofessional conduct in this case. We have included a lengthy description of Mr. Charles's conduct in this case because we intend to send this order along with the related orders and underlying filings to the Alaska Bar Association. We fully expect that the Alaska Bar will investigate this matter, and will take whatever actions are appropriate, including informing the bar associations in the other jurisdictions where Mr. Charles is licensed to practice.

However, in the interests of timely resolving this appeal, we will accept the second reply brief as submitted although we will disregard the reference to material outside the record as well as the personal attacks against opposing counsel. In addition, because distribution of briefs to Westlaw is not required under the statutes or rules, we will not send the briefs in this case to Westlaw although we will send the Court's decision once it is issued. Accordingly, the motion to strike the appellee's brief is DENIED, the motion for reconsideration is GRANTED, the second reply brief is accepted as filed, and this case is now under advisement before this Court.

Entered at the direction of the Court.

Clerk of the Appellate Courts



Ryan Montgomery-Sythe,
Chief Deputy Clerk

cc: Court of Appeals Judges
Alaska Bar Association

Distribution:

Email:
Charles, Nathan M. F., Court under Rule 12
Rosenstein, Kenneth M.